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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 585

JEANNETTE A. NOEL, CATHERINE A. BROWN, PAULINE A. LANDIS, ROBERT L. ACKLEN, *Petitioners,*

v.

LDSON B. OLDS, JR., AMERICAN SECURITY AND TRUST COMPANY OF WASHINGTON, D. C., Executors and Trustees Under the Will of William Hayes Ackland, Deceased; ROLLINS COLLEGE, a Corporation, University of North Carolina, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

FRANK J. HOGAN,
JAMES C. ROGERS,
Counsel for Petitioners.

AUSTIN W. SCOTT,
ARTHUR J. PHELAN,
LESTER COHEN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Jeannette A. Noel, Catherine A. Brown, Pauline A. Landis and Robert L. Acklen, respectfully file and submit this as their petition for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the District of Columbia.

Said Court of Appeals on October 11, 1943, reversed a decision and judgment of the District Court of the United States for the District of Columbia in favor of petitioners and against respondents herein (R. 167-175). That deci-

sion as yet is not reported. The mandate has been stayed by proper order, and the cause is now filed and docketed herein for decision.

In the court below four separate appeals were taken from the decision and judgment of the District Court. Those appeals were consolidated for hearing (R. 92) and one opinion was rendered and one judgment was entered in that Court covering all four appeals. (R. 176.)

SUMMARY STATEMENT OF MATTER INVOLVED.

This was an action to construe a will. The original complaint filed by petitioners herein, challenged the validity of trusts set up in the will of William Hayes Ackland, who died in the District of Columbia on February 16, 1940, on the ground that they violated the rule against perpetuities. By said will testator's entire residuary estate was given to trustees under the following terms and conditions:

> "Item VII. All of the rest, residue and remainder of my property and estate, both real and personal, * * * I give, devise and bequeath, absolutely and in fee simple, unto my executors, hereinafter named, as trustees, to hold the same, *in trust*, in the manner and for the uses and purposes hereafter set out, that is to say:
> * * *
>
> (c) I direct my trustees to have erected upon the campus of said Duke University, at Durham, North Carolina, as soon after my death as arrangements therefor can reasonably be completed, a memorial building in the form of a gallery or museum, to include an apse for the interment of my remains, to be known as the William Hayes Ackland Memorial, substantially in accordance with plans for such a museum which said Duke University has heretofore submitted to me. I direct that the cost of said building shall be as estimated by the architect who prepared said plans, approximately Two Hundred Fifty Thousand Dollars ($250,000) but in no event more than Three Hundred Thousand Dollars ($300,000). When said building shall have been completed, I direct that my remains be transferred to the apse which is to be a part thereof, for

permanent interment in a marble sarcophagus beneath a recumbent statue. I further direct that there shall be placed and maintained in said building, on permanent exhibition, all of my tangible personal property and effects preserved for that purpose in accordance with the provisions hereinbefore contained, and such other objects of art as may be added thereto as hereinafter provided." (R. 10.)

The balance of the trust fund remaining in the hands of testator's trustees after erection of the building was to be held by the trustees with full powers of management, and said trustees

> "shall allow the net income arising therefrom to accumulate in their hands and shall invest and reinvest the same in accordance with the powers hereinabove set out, but such accumulations and the investments thereof shall be kept in a separate fund, from which there shall be paid such thereof as may be necessary to carry out the following directions, namely (R. 10-11): * * *
>
> Item VII (d) 7. After the completion of the building provided for in subitem (c) of this Item VII of my will, and after the fulfillment of all of the requirements upon the accumulated income from my trust estate, the entire remainder of such accumulated income shall be used and applied by my trustees for the perpetual maintenance and upkeep of said building and its contents, and for the acquisition of such objects of art as may be selected and designated by the governing body of Duke University, which objects, when acquired, shall be placed in said building on permanent exhibition, as well as for the enlargement of such building at such time or times as, in the judgment of my trustees, the enlargement thereof shall be feasible." (R. 12.)

The will directed that the trustees should have full and complete discretion in connection with the administration of the trust, and their decision in regard to any matter arising out of their administration was to be binding and conclusive upon all concerned. (R. 12.)

After the construction suit was filed, Duke University renounced all of the benefits, burdens and responsibilities

of the will insofar as it was concerned. (R. 29-30.) Testator's executors and trustees then filed an answer to the construction suit and also a cross-claim and counter-claim. The answer asserted the validity of the trusts and the cross-claim and counter-claim "demanded" that the court authorize them to erect upon the campus of the University of North Carolina, or Rollins College, or some other southern State university, or adequately endowed southern university an art gallery or art museum substantially in accordance with the plans which Duke University had submitted to the testator; that the court appoint a university to administer the foregoing provisions of the decedent's will; and that the court authorize and direct said trustees to apply the separate fund to be created out of the income of decedent's trust estate to repair and maintenance of the gallery thus erected and for the purchase and acquisition of such objects of art as might be selected by the governing body of the university substituted by the court in the place and stead of Duke University. (R. 28.)

The trial court decreed that because "Duke University having declined all of the provisions of said will, including all of the benefits, burdens and responsibilities thereof, and the trust having thus become impossible of performance in the particular manner set forth in the will, the trust has failed"; and that the executors and trustees named in the will "hold the remainder of the trust fund (after the payment of certain legacies) under a resulting trust for the next of kin of the decedent." (R. 90.)

Your petitioners are next of kin of decedent.

As indicated above, the court below reversed the judgment of the trial court and held that, even though Duke University declined the benefits of the will, the testamentary representatives could apply the trust fund *cy pres* and erect a building on the campus of some other university and utilize the remainder of the fund to maintain that building and buy objects of art to be placed therein (R. 167-175).

The court below ignored completely the question whether or not testator would have been satisfied to have his

body transferred to a building on the campus of the University of North Carolina or any other university; whether or not the duty of editing certain manuscripts written by the testator, imposed upon Duke University, could properly be transferred to the faculty of some other college or university or whether or not testator would have been satisfied to have all of his tangible personal property placed and maintained on permanent exhibition in a building on the campus of any institution other than Duke.

Petitioners have contended from the outset that testator's will was plain and unambiguous on its face; that there is no uncertainty in the will; that extrinsic evidence was neither necessary nor admissible to construe said will; and that a fair reading of the will conclusively established that the gift to Duke University was to a specific institution for a specific purpose and that it was impossible to find from the will itself that the testator had a general charitable intent as distinguished from the desire to perpetuate his name at Duke University in the specific manner provided for in his last will.

Respondents neither in the District Court nor in the court below made any claim whatsoever that testator's will was ambiguous or that a latent ambiguity arose as a result of the renunciation of Duke University. Nevertheless they pleaded, by way of cross-claim and counter-claim, quantities of extrinsic evidence, such as correspondence between Duke University and testator; a letter from the testator to the University of North Carolina and another to Rollins College; a former and revoked will of the testator executed more than two years before the date of his last will; and much concerning testator's early life and background. (R. 17-39)

In the trial court your petitioners moved for judgment on the pleadings under Rule No. 12 of the Federal Rules of Civil Procedure. At the hearing on that motion the trial court refused to consider extrinsic evidence and construed the will of testator as written. Judgment was granted in

favor of your petitioners that testator's executors and trustees held the residuary estate of the testator under a resulting trust in favor of his next of kin.

The executors and trustees appealed to the court below from that judgment, claiming that the trial court should have directed it to select some other university in the place and stead of Duke. Rollins College likewise appealed because it contended that, if Duke University renounced, it became entitled to the trust fund because it had at one time agreed with the testator to accept a testamentary gift from him and that it had been mentioned as an alternate beneficiary of the trust in a prior will.[1] The University of North Carolina likewise appealed from the judgment of the trial court. It was not named a party defendant in the original proceedings. It sought to intervene. It was not permitted to intervene. It appealed from the court's order refusing it permission to intervene. Its ground for intervention, as well as appeal, was that it was entitled to the trust fund because it was mentioned as a possible beneficiary in testator's prior will, in the event Duke University did not take the gift.

Your petitioners also appealed to the United States Court of Appeals from that part of the judgment of the lower court that upheld the pecuniary legacies bequeathed under Item VII (d) paragraphs 3, 4, 5 and on other grounds not pertinent here.

In the court below, at the outset, your petitioners filed a motion to dismiss the appeals of Rollins College, University of North Carolina, and of the executors and trustees on the ground that none of those appellants were parties aggrieved by the decision of the District Court. (R. 99-100) In that motion it was pointed out that Rollins College and the University of North Carolina were not aggrieved since they could not claim the fund as a matter of right any more

[1] Rollins College was named as a defendant in the trial court because it was a beneficiary under the will to the extent of $50 per year. See Item VII (d) 6 of the will, R. 11.

than could any other school or university in the country; they were not named as contingent beneficiaries in the will under construction and they lost no legal right by reason of the action of the trial court.

The right of the executors and trustees to take an appeal was challenged on the ground that they were not parties aggrieved, in that the judgment of the lower court merely provided how the residuary estate of the testator should be distributed and that, in the legal sense, they were not and should not be concerned in the slightest with the question of the distribution to appellees as next of kin of the testator. The executors and trustees have never claimed any pecuniary damage to themselves by reason of the decision of the trial court. Their action in appealing was purely in a representative and not an individual capacity.

Despite petitioners' request that the motion to dismiss be determined *in limine*, the case was set for argument on the merits. The rules of the court below (Rule 31(j)) provide that no oral argument will be permitted on motions unless directed by the court. No direction was given in the instant case, and the motion to dismiss was never argued. The court below has never passed upon the merits of the motion to dismiss.

Following the argument, the court below, on October 11, 1943, rendered its opinion and judgment reversing the lower court. In that opinion the merits of the appeals were discussed and decided. That court held that the judgment of the District Court must be reversed because the doctrine of *cy pres* is applicable in the District of Columbia and the case at bar is an appropriate one for the application of that doctrine.

The court below in its opinion and decision undertook to point out why the doctrine of *cy pres* should be applied in the instant case. In its opinion it made reference to, considered, and drew heavily from a prior and revoked will of the testator, without any explanation as to why it was necessary to refer to that prior will. It referred to, quoted

from, and based many of its conclusions on correspondence between an official of Duke University and the testator without any finding whatsoever that the will under consideration is ambiguous and that it was therefore necessary to resort to extraneous evidence in order to determine testator's intentions. As indicated above, no one has ever contended that a patent ambiguity existed in the will under construction or that a latent ambiguity arose by reason of the renunciation of Duke University.

Testator, in his last will, did not make any provision for the disposition of his estate in the event Duke University should renounce. He did not state any general charitable purpose. He did not state that he would be satisfied to be buried on the campus of any university other than Duke University. He did not state that if the faculty of Duke University refused to accept his manuscripts, edit them, and attempt to publish them, as it was charged to do under the will, he would be satisfied to have the faculty of some other university do that work in lieu of Duke.

The court below, however, undertakes to supply all of these omissions; it finds specifically what testator "would have wished" and what his "intention would have been, in the event which actually occurred". (R. 174, 175) For that matter, it undertakes completely to rewrite testator's will and substitute its judgment for the will of the testator. For example, Mr. Justice Miller, speaking for the court, said, "To the extent that the building to be erected on the campus of Duke University was to be used for university purposes, presumably Duke would be in charge of that use". However, despite the fact that testator made no mention of any other university and had dropped the name of one university and one college from his former will, the court says: "These functions could be as well or better performed by other universities" and the beneficiaries of the trust "could be as well or better served by other universities".

It is clear that in order for the *cy pres* doctrine to have any application the trust instrument must contain a general charitable intent. As has been said, testator failed completely to express any general charitable intent that he might have had in mind. The court below, however, says: "The dominant idea in the mind of the testator was the cause of art in the South". The expression, "cause of art", does not appear in testator's will at any point. The word, "south", does not appear in the will. The entire expression, "cause of art in the South", is taken from a letter written by the then President of Duke University to the testator. (R. 169)

The court below says that testator named Duke University to take his gift because of "blandishments" practiced upon him by the President of Duke. It then says that testator "had been assured that if he did so his purpose of forwarding the cause of art in the South would be carried out." (R. 174) This in spite of the fact that the day testator executed his last will he received a letter from the President of Duke, saying, "If * * * you leave the whole matter as it was when I was in Washington I shall not feel hopeful of the outcome * * *". (R. 169)

We see, therefore, that the court below surmises that testator would have made an alternate bequest to some other university but for assurances from Duke that it would accept testator's gift. The fact is testator was on notice that Duke might not accept and he did not name an alternate. While we contend it is improper to resort to extrinsic evidence we find, from such a reference, that testator named two alternates in his prior will.

As we have said, testator did not state that any other institution should be selected in the event Duke failed to accept his gift. Yet, the court below says: "He intended that the seat of his enterprise should be a university, * * *". The officials of Rollins College could not find that intention in testator's will because they claim the fund should go to it.

After a long discussion of the merits of the case and in the concluding paragraph of its opinion, the court below recognizes for the first time the motion to dismiss and disposes of it by stating: "Jeannette A. Noel, et al. filed a motion to dismiss all the appeals except their own. Action upon this motion was postponed until the case could be heard upon its merits. In view of our conclusion that the judgment of the District Court must be reversed, the motion is denied and the cause remanded with instructions * * *".

The decision of the appellate court is, therefore, that because in its opinion the case was improperly decided by the District Court it was unnecessary for it to determine whether or not it had jurisdiction to hear the appeals and to decide whether Rollins College, the University of North Carolina, and the executors and trustees of testator's estate were parties aggrieved by the decision of the trial court.

QUESTIONS PRESENTED.

Where the jurisdiction of an appellate court is challenged by an appropriate motion to dismiss an appeal, may that court proceed to a decision of a matter on the merits and ignore the challenge with the mere assertion that "in view of our conclusion that the judgment of the District Court must be reversed, the motion is denied"?

In the District of Columbia, can a party not aggrieved by a decision of the District Court take an appeal to the United States Court of Appeals for the District of Columbia?

Are executors and trustees named in a will parties aggrieved within the meaning of Title 17, Section 101 of the District of Columbia Code, 1940 edition, by a decision of the District Court construing a will and directing the manner in which testator's estate is to be distributed?

Is the doctrine of *cy pres* in force in the District of Columbia?

In construing a will, can resort be had to a former will of the testator, letters written by the testator, letters written to the testator, and other extrinsic evidence, in the absence of any finding that the will is patently ambiguous, or that a latent ambiguity has arisen by reason of some unforeseen circumstance?

Is the gift to Duke University in the case at bar one to a specific institution for a specific purpose, or does the will under construction show on its face a general charitable intent?

THE STATUTE INVOLVED.

Title 17, Sec. 101 of the District of Columbia Code, 1940 ed., provides as follows:

> "Any party aggrieved by any final order, judgment, or decree of the District Court of the United States for the District of Columbia, or of any justice thereof, may appeal therefrom to the said United States Court of Appeals for the District of Columbia; and upon such appeal the United States Court of Appeals for the District of Columbia shall review such order, judgment or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections. Appeals shall also be allowed to said United States Court of Appeals for the District of Columbia from all interlocutory orders of the District Court of the United States for the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said United States Court of Appeals for the District of Columbia, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal. (Feb. 9, 1893, 27 Stat. 435, ch. 74 § 7; Mar. 3, 1901, 31 Stat. 1225, ch. 854, § 226; Mar. 3, 1921, 41 Stat. 1312, ch. 125, § 12.)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

It is important that this Court pass upon the question whether or not a Federal court of appeals can determine a case upon its merits without first determining that it has jurisdiction, when that jurisdiction has been challenged. This question goes to the very roots of our entire judicial system.

It has been assumed for many years that the doctrine of *cy pres* has not been in force in the District of Columbia. Many estates have been settled and disposed of on that basis. In 1929 the court below said categorically that "the doctrine is not in force in this District * * *".[1] The trial court said it could not follow the *cy pres* doctrine because of the rulings of the court of appeals. Nevertheless, in the case at bar, the court below said "that the doctrine of *judicial cy pres* is applicable in the District has never been denied." It is important that this Court should determine whether or not a rule of property such as that involved in the *cy pres* doctrine can be upset by a court or whether that is the function of the Congress.

The decision of the court below is in conflict with decisions of this Court, decisions of other Federal courts, and prior decisions of its own in that it is predicated upon evidence outside the will, declarations of the testator, a prior and revoked will, and the court's own impressions of Duke University and its former President.

The court below has decided erroneously a question of general as well as Federal importance involving the law of charitable trusts. It has, in effect, held that wherever a gift to an educational institution fails, it is, nevertheless, to go to education. The doctrine of *cy pres* has never been extended as far as that.

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[1] *Graff* v. *Wallace*, 59 App. D. C. 64, 32 Fed. 2d 960.

This Court should review the law of charitable trusts in the light of present day economic conditions and fiscal problems. While it is admittedly in the public interest to encourage genuine charity, it is also a matter of grave public concern that the taxing powers of the federal government not be frustrated by the tendency to perpetuate anything having the remotest appearance of a charitable trust.[1] It is a fitting time for this Court to re-examine the entire problem in the light of present conditions and tendencies and lay down a standard that will guide Federal courts and taxing authorities in determining what gifts should be upheld as charitable, and hence can properly be applied *cy pres* and hence be accorded Federal tax exemption.

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[1] In the case at bar, testator left an estate of approximately $1,300,000 in securities, and tangible personal property including manuscripts, pictures, scrapbooks and statuary, appraised at an aggregate value of $898.20. (R. 4, 15.) He provided that a $300,000 building be built on the campus at Duke University and, when the building is completed he directs that "my remains be transferred to the apse which is to be a part thereof, for permanent interment in a marble sarcophagus beneath a recumbent statue. I further direct that there shall be placed and maintained in said building on permanent exhibition all of my tangible personal property and effects preserved for that purpose * * *". (R. 10.) He further provides that other objects of art selected by the governing body of Duke University may be placed in the building when acquired, but provides that no funds shall be available for this purpose until certain legacies have been paid out of the accumulated income of his trust estate, and certain other expenses paid. He also provides for the permanent maintenance and upkeep of the $300,000 building from the income of his trust estate, before objects of art can be purchased.

If the decision of the court below is upheld, the Federal government loses approximately $300,000 in estate taxes and the public generally will, for many years at least, look at testator's picture of Queen Victoria, his pieces of statuary, his manuscripts that he was unable to sell in his lifetime (R. 18), the outside value of which amounts to $898.20, unless the ultimate educational institution taking the gift stultifies itself by using the building for purposes not specified in the will.

PRAYER.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, commanding the said court to certify and send to this Court a full and complete transcript of the record and all proceedings in said United States Court of Appeals in said consolidated case therein entitled, namely, *Jeannette A. Noel et al., Appellants* v. *Edson B. Olds, Jr., et al., Appellees; Rollins College, a Corporation, Appellant* v. *Jeannette A. Noel et al., Appellees; Edson B. Olds, Jr., et al., Appellants* v. *Jeanette A. Noel et al., Appellees;* and *University of North Carolina, Appellant* v. *Jeannette A. Noel, et al., Appellees;* Nos. 8352-8353-8354-8355 respectively, to the end that said case may be reviewed and determined by this Court and that the judgment of the United States Court of Appeals for the District of Columbia may then be reversed.

JEANNETTE A. NOEL,
CATHERINE A. BROWN,
PAULINE A. LANDIS,
ROBERT L. ACKLEN,
Petitioners.

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LESTER COHEN,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia will be found beginning at page 167 of the record herein. It has not as yet been officially reported.

JURISDICTION.

The decision of the United States Court of Appeals for the District of Columbia was rendered on October 11, 1943. The jurisdiction of this Court is based on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A., Sec. 347(a).

QUESTIONS PRESENTED.

The questions presented are stated in the petition (*supra*, p. 10).

SPECIFICATION OF ERRORS.

(1) The United States Court of Appeals for the District of Columbia erred in failing to consider and in denying petitioners' motion to dismiss the appeals of Rollins College, the University of North Carolina, and Olds and the American Security and Trust Company, as executors and trustees under the last will and testament of William Hayes Ackland, deceased.

(2) Said United States Court of Appeals erred in holding that the doctrine of *cy pres* is in force in the District of Columbia.

(3) Said United States Court of Appeals for the District of Columbia erred in holding that the last will and testament of William Hayes Ackland showed the testator had a general charitable intent as distinguished from an intention to give his residuary estate to a specific institution for

a specific purpose and in holding that the doctrine of *cy pres* was applicable in the case at bar.

(4) The United States Court of Appeals for the District of Columbia erred in considering a former Will of the testator, declarations of the testator made during his lifetime, letters written by the testator to officials of Duke University, and other extrinsic evidence and in predicating its opinion that testator had a general charitable intent upon such extrinsic evidence.

(5) The court erred in reversing the decision of the District Court.

ARGUMENT.

I. The Court Below Erred in Ignoring the Challenge to Its Jurisdiction.

The court below has adopted the novel, and we submit, erroneous view that a motion directed against its jurisdiction to hear an appeal need not be considered if it finds against the moving party on the merits. In substance, the court below has held that, notwithstanding an attack on its jurisdiction made at the outset of the proceedings, it may proceed to a full consideration of the merits of the appeal and find against petitioners on the merits without considering, in the first place, whether or not it has jurisdiction to entertain the appeal.

The District Court had ruled that the will of William Hayes Ackland created a valid charitable trust but that since Duke University, the beneficiary thereof, had renounced, the trust had failed, and there arose a resulting trust for the benefit of the next of kin of the testator. In so holding that court found that the trust could not be administered *cy pres*. Three parties filed appeals in the court below from this part of the decision. They all three contended that the *cy pres* doctrine was in force in the District of Columbia, and being in force, should be applied in the instant case. Those appealing on this basis were the execu-

tors and trustees named in the will, the University of North Carolina and Rollins College.

Your petitioners thereupon filed motions to dismiss these appeals on the ground that the parties appellant were not aggrieved parties within the meaning of Title 17, Section 101 of the D. C. Code and, therefore, the court was without jurisdiction to entertain the appeals. In the preliminary statement contained in their brief in support of the motion to dismiss your petitioners stated:

"As this motion goes directly to the fundamental question of this Honorable Court's jurisdiction to consider these three appeals, it is respectfully submitted that justice would be served and the administration of the estate expedited by consideration and disposition of this motion *in limine*". (R. 101)

The rules of the court below (Rule 31(j)) provide that no oral argument will be permitted on motions unless otherwise directed by the court. The court below did not at any time direct argument on the aforesaid motion to dismiss and, consequently, the motion has never been argued.

The first and only acknowledgement of the motion to dismiss will be found in the next to the last paragraph of the decision of the court below. After fully considering, weighing and deciding all issues pertaining to the merits of the cause and the appeals to which the motion to dismiss was directed, the court makes this singular reference to the motion to dismiss:

"Jeannette A. Noel et al. filed a motion to dismiss all the appeals, except their own. Action upon this motion was postponed until the case could be heard upon its merits. *In view of our conclusion that the judgment of the District Court must be reversed, the motion is denied and the cause remanded with instructions to proceed in accordance with the opinion.*" (Italics supplied) (R. 175)

It is fundamental that the question of a court's jurisdiction to entertain an appeal must be met on the threshold,

and where attack is made the matter must be disposed of in favor of the court's jurisdiction before a court may, with any color of right, consider the issues pertaining to the merits of the cause. This would seem so clear as to make argument frivolous. Certainly where a challenge to a court's jurisdiction has been squarely and properly made, the court must dispose of the question, before it may entertain the cause on its merits.

These fundamentals have been completely ignored by the court below and since the question of an appellate court's jurisdiction is so vital to the integrity of our judicial system, for this reason alone, this Honorable Court should grant the writ here sought.

II. Had the Court Below Considered the Motion to Dismiss, it Should Have Granted the Same.

Attached to the printed motion to dismiss, which appears at page 99 of the Record, is the brief filed in support thereof.

The substance of the argument advanced in the court below and reasserted here is that the three parties who appealed the decision of the trial court holding the doctrine of *cy pres* inapplicable to the case at bar were clearly not parties aggrieved by that decision within the legal definition of that term.

It is clear that Olds and the Trust Company, as executors and trustees, were not aggrieved by the trial court's decision which merely ordered the payment of the fund renounced by the named beneficiary to the next of kin of the testator. As representatives of the estate of the decedent, their powers, duties and privileges must flow from the instrument which they have been designated to administer. Their position should be a neutral one. They are not charged with the duty nor do they have the power to represent the public generally or to advocate their own particular and individual views of public interest.

Neither the University of North Carolina nor Rollins College would have any claim to the fund as a matter of right even though it was clear that this was a proper case for the application of the *cy pres* doctrine. Neither institution was named as an alternate beneficiary in the will of the testator and had no more standing in the court below than would the University of Texas, the University of Southern California, or any other college or university in the United States.

We submit that it is apparent that the jurisdiction of the court to consider the appeals was a serious one and was appropriately brought to the court's attention at the outset, and we respectfully urge that the court's action in the first place in deciding the merits without consideration of the motion was a grievous error and that, in the second place, had it given the motion the consideration it merited, it should have found for the petitioners.

III. The Court's Treatment of the Question: Whether or Not the Cy Press Doctrine is in Force in the District of Columbia.

We submit that substantial error warranting the granting of the writ exists, in view of the action of the court below in holding that the doctrine of *cy pres* exists in the District of Columbia.

The *cy pres* doctrine is not one of uniform application in the United States as it is in England. The doctrine of judicial *cy pres*, originating in England, migrated here, to be used by some of the States and rejected by others. The District of Columbia has been considered one of those jurisdictions in which the doctrine was not in force (See 2 Bogert, Trusts and Trustees, 1297). In 1929, in the case of *Graff* v. *Wallace*, 59 App. D. C. 64, 32 Fed. 2d 960, the court below reaffirmed the general understanding that had existed prior to that time in the District of Columbia and flatly held that the doctrine was not in force there. The trial court in the instant case unhesitatingly ruled that its hands were tied because it was the settled rule, by which it

was bound that the *cy pres* doctrine was inapplicable. Notwithstanding this, the court below reached the amazing conclusion that it has never been denied that the doctrine was applicable in the District. The Court said: "*That the doctrine of judicial cy pres is applicable in the District of Columbia has never been denied.* * * *"

In its opinion below the court examined *Graff* v. *Wallace, supra*, and stated that the language used was *obiter dictum* and, in any event, related not to judicial *cy pres* but prerogative *cy pres*. At the outset, even though it were conceded that the language constituted *obiter dictum*, it is difficult to understand how the court could have stated that it has never been denied that the doctrine was applicable in the District of Columbia. That which the court had before it in the *Graff* case involved the question of the exercise of *judicial cy pres* and, by no reasoning, can it be said that prerogative *cy pres* was the subject of the court's decision. In that case the testator established a trust, the income from which was to be used to create and maintain a hospital for the care of crippled children in the District of Columbia. Counsel supporting the trust had contended in the lower court that under any circumstances the trust should not fail but that the income, if insufficient for a hospital, could be used to maintain a ward in an already existing hospital. The trial court suggested it might have power to direct its use for that related purpose. The District Court of Appeals held the provisions of the trust could be carried out and that the accumulations did not violate the rule against perpetuities. It then treated with great detail the suggestion made, that, even if a hospital could not be established out of the fund, the court could direct the use of the fund by some other existing hospital. The court said:

> "It, however, is intimated by counsel for appellees that if the conditions should at any time require, the equity court would have inherent power to so modify details of the testator's plan for carrying his charita-

ble purpose into execution as to make it practicable and thereby prevent intestacy. Counsel suggest in their brief that: 'If a fund bequeathed to maintain a hospital is not sufficient for that purpose, a court of equity may direct that a ward in an existing hospital be supported from the testator's bounty.' And the learned justice below, in his opinion, suggested that: 'If it should later appear that the income alone should not be sufficient, if accumulated for a reasonable time, to accomplish the purposes of the testator in the particular manner prescribed by him, I think that the court, upon proper proceedings, would have the power to have the same charitable purposes carried out in some more practicable manner.' "

And, dealing specifically with the question of judicial *cy pres* to be exercised by the lower court, the Court of Appeals said:

"The present bequest calls for the establishment of a charitable institution, a hospital bearing the name of the testator; and the creation of a fund is provided from the income of the estate to be expended by the trustees for the care of patients therein. Any diversion of the fund to a use not contemplated by the testator, such as keeping patients in a ward of an established hospital, would constitute an unlawful discharge of the trust, and the application of the fund to a purpose not intended or contemplated by the testator. Such a disposition of the income would prevent the accumulation of a fund for the establishment and maintenance of a hospital and thereby defeat the chief object the testator had in mind. *The provisions of the will are explicit, and the fund created can only be appropriated under the trust to the erection and maintenance of a hospital.*" (Italics supplied)

Only through the use of the most forced reasoning can it be said that the court below in the *Graff* case was dealing with prerogative *cy pres* and not judicial *cy pres*. That which was suggested to the court was that the trial court should direct that a fund given for the erection of a hospital

be diverted to the support of a room or a ward in an existing hospital "as the next best thing". This is the application of judicial *cy pres* in its purest form.

It is respectfully submitted that the finding by the court below that the doctrine is in existence in the District of Columbia and indeed that its existence has never been questioned is contrary to law and fact. If it were deemed desirable at this time to adopt the principle of *cy pres* for this jurisdiction, it would seem that the only proper way to accomplish this result would be through the enactment of legislation by Congress acting for the District of Columbia rather than by the process of judicial interpretation at this late date.

If this were done, the Attorney General of the United States, or some other government official would be charged with the responsibility of representing the public interest, as is the case in all States where the doctrine is in force. It is significant that Congress has never designated any officer of the Federal government or the District of Columbia to represent the public in cases when there is a failure of a charitable trust in the District. The non-existence of the doctrine of *cy pres* has been a rule of property in this jurisdiction and has controlled the passage and distribution of property for more than a century. It should not, we submit, be disturbed without action from the legislature.

IV. The Decision Below Creates Serious Uncertainty and Confusion as to the Admissibility of Extraneous Evidence Where the Will is Clear and Unambiguous.

Mr. Ackland's will was conceded by all parties to be clear and unambiguous. The court below makes no finding that ambiguity, either latent or patent, exists. Under such facts, the prevailing law of the District of Columbia and of this Court is that extraneous evidence may not be considered but that the intent of the testator, as expressed by him in his will, controls. (*Association of Survivors of 7th*

Ga. Regiment v. *Larner*, 55 App. D. C. 156, 3 F. (2nd) 201; *Brown* v. *Wells*, 45 App. D. C. 428; *Crenshaw* v. *McCormick*, 19 App. D. C. 494; *In re Vanderhurt* v. *Anderhursh*, 171 Cal. 553, 154 P. 5; *Eneri* v. *Haven*, 67 N. H. 503, 35 A. 940; *Wilkins* v. *Allen*, 13 Howard 385, 15 (L. Ed.) 396).

In complete disregard of this well established principle of law, the court below, without any explanation or attempted justification, proceeded in the most minute detail to examine, consider and weigh every discernible shred of extraneous evidence contained either in the pleadings of the parties, exhibits filed and, indeed, even facts or conclusions that were personally known to or gleaned by the court from information or sources not disclosed in the opinion.

In face of the fact that no ambiguity was alleged to exist, and in utter disregard of its own well established rule of law and the rule of this Court, the court below, without once meeting the issue or explaining why it chose to disregard or ignore settled principles of law, found, considered and, to a substantial extent, grounded its decision upon such evidence as: (1) a former and revoked will of the testator not in issue; (2) letters written by the testator to three different universities after the execution of the revoked will and before the execution of the will in issue; (3) alleged interviews and correspondence between the testator and Dr. Few, then President of Duke University; (4) oral and written assurances alleged to have been made by Dr. Few concerning the testator's plans; (5) a set of plans not filed with the will for probate or treated as a part of the will by the executors when they applied for appointment; and (6) numerous other evidentiary matters outside the will of the testator.

As a result, the court below concluded (1) that the testator had a heartfelt interest in the cause of art in the South; (2) that Dr. Few, President of Duke University, had been engaging in blandishments in his dealings with the testator and was attempting, for reasons which the Court said were

not clear to it, to persuade the testator to make an *inter vivos* gift to Duke University instead of a testamentary trust; (3) that because of those blandishments testator did not provide for the disposition of his estate in the contingency that arose, namely, the renunciation of Duke; (4) that the paramount, dominant and primary purpose of the testator was to give to charity generally and that his motive or desire to perpetuate his name by the inclusion of an apse and recumbent statue was minor or insignificant compared to the larger purpose; (5) that Duke University had "repented * * * the blandishments practiced upon William Hayes Ackland during his life time * * *"; (6) that the functions of the beneficiary under the testator's will "could be as well *or better* performed by other universities"; (7) and what testator would have wished and what his intention would have been had considered the fact that Duke might not accept his gift.

The court below made all of these findings, and many others, most of which are fundamental to its final conclusion that a general charitable intent existed in the mind of the testator as distinguished from his will, and, consequently, the trust may be administered *cy pres*. We respectfully submit that not one of these conclusions can be reached from an examination and study of the testator's will. Certainly the will does not bespeak blandishments "practiced" by Dr. Few of Duke University on the testator.

V. Courts Cannot Speculate as to What a Testator Would Have Done or Guess at What Provision Testator Probably Might Have Made if He had Considered and Provided for a Certain Contingency.

The court below apparently recognized the proposition that even in those jurisdictions where the *cy pres* doctrine has been held to apply, the doctrine cannot be used except in cases where the testator in his will expresses a general charitable intent. In its opinion, however, the court below does not state that it found such an intent from the testa-

tor's will, it merely says "the dominant idea *in the mind* of the testator was the cause of art in the South". It speaks of what "testator would have wished" and what his "intention would have been" had he made provision for the event that occurred, the renunciation of Duke. It ignores completely the rule that where a gift is made to a particular institution for a particular purpose, the doctrine may not be employed. Both rules are exceptionally well stated in a recent case[1] wherein the court said:

> " * * * There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect. If that mode fails, the court says the general purpose of the charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution, and then if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognized, and it cannot be said that wherever a gift for any charitable purpose fails it is nevertheless to go to charity' ".

It is improper for a court to speculate as to what testator's intention would have been had he contemplated the event which actually occurred. It would have been such a simple matter for testator to have chosen an alternate beneficiary had he wanted one in the event that Duke did not accept his gift. If he had a general charitable intent to further the cause of art in the South, it would have been so easy for him to have said so in his will. He did not do so, and now we find the court below supplying his wishes, determining what was in his mind, and finding what his intention would have been had he expressed it.

In the very recent case of *Chicago Daily News Fresh Air Fund* v. *Kerner*, (1940) 305 Ill. App. 237, 27 N. E. (2d) 310, the court had under consideration an almost identical set of facts. In considering this case, it should be borne in mind that the Illinois courts recognize and apply the cy pres doctrine very liberally. Because the court in this case

[1] Morristown Trust Co. v. Mayor, et al, Town of Morristown, 91 Atl. 736, 82 N. J. Eq. 521.

covers every phase of the case at bar so well and pointedly we quote fully from the opinion. The facts and pertinent parts of the opinion are as follows:

> "* * * the issue in this case is whether a bequest under the will of David E. Fiske to the Chicago Daily News Fresh Air Fund, a charitable corporation, which the Fund has renounced, should go to the heirs as in the case of intestacy, or should be awarded to some similar charity under the doctrine of cy pres. (p. 311)
>
> * * * * * * * * *
>
> "The court will adopt any reasonable construction of a will rather than hold that the testator intended to die intestate, but if he has overlooked something which he perhaps would have provided for if it had occurred to him, the court cannot guess as to what his disposition might have been. *Pontius* v. *Conrad,* 317 Ill. 241, 148 N. E. 17.
>
> * * * * * * * * *
>
> "In the instant case the testator bequeathed part of his residuary estate to the Chicago Daily News Fresh Air Fund, the plaintiff. By its complaint the court was informed that it declined to take the bequests as it had decided to discontinue its operations. The will of the testator made no provision for such a contingency. *The court has no way of knowing what the testator might have done if he had in mind that the Fund might suspend operations. The Attorney General argues the testator would have directed that the property go to another charity of similar purpose, but this is mere speculation. The courts cannot guess at what provision the testator probably might have made. It is well established that the intention of a testator must be drawn from the language of the will itself. Dahmer* v. *Wensler,* 350 Ill. 23, 182 N. E. 799, 94 A. L. R. 1, and in *Hampton* v. *Dill,* 354 Ill. 415, 420, 188 N. E. 419, 421, it was said, '*the court cannot guess which provision he would have made and read it into his will on the presumption that he would naturally have made such a provision if he had thought of it.*' *LaRocque* v. *Martin,* 344 Ill. 522 ,176 N. E. 734. (p. 311) (Italics ours)

Countless other cases could be cited in support of the above. We believe, however, that the propositions of law set out in the foregoing quotation are so clear and so fundamental that the citation of further cases is unnecessary.

In the instant case about the most that can be said of Ackland's charitable intention as set out in his will is that Duke University is an educational institution and from that fact a general charitable intent should be inferred. In this connection, we think it pertinent to again refer to the well-settled rule that a general charitable intent cannot be deduced from the sole fact that the organization named in the will is engaged in a particular charitable work.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari is within the provisions of Rule 38 of this Court; that the problems presented are of widespread importance in which this Court should exercise its power of review to settle the legal questions involved. It is, therefore, respectfully urged that a writ of certiorari should be granted.

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(10)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 585.

JEANNETTE A. NOEL, CATHERINE A. BROWN, PAULINE A. LANDIS, ROBERT L. ACKLEN, *Petitioners,*

v.

EDSON B. OLDS, JR., and AMERICAN SECURITY AND TRUST COMPANY OF WASHINGTON, D. C., Executors and Trustees Under the Will of William Hayes Ackland, Deceased; ROLLINS COLLEGE, a Corporation, and UNIVERSITY OF NORTH CAROLINA, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BRIEF STATEMENT OF CASE.

William Hayes Ackland, a resident of the District of Columbia, bequeathed his entire estate of approximately $1,400,000.00 to respondents Olds and American Security and Trust Company, *as trustees,* with directions to erect a memorial art museum on the campus of Duke University at Durham, North Carolina, to cost not to exceed $300,000.00, and to use the income from the balance of the corpus to maintain the museum, to buy art objects for exhibition therein, and later to enlarge the building. Petitioners, his next of kin, filed suit to have the trust declared invalid. Thereafter, Duke University renounced the provisions of

the will, and it thereby became impossible to perform the charitable trust in the exact manner therein prescribed. The trial judge held that the will created a valid charitable trust but that the declination of Duke University having made the trust impossible of performance *in the exact manner set forth in the will*, the trust thereby failed, because in his opinion the doctrine of judicial *cy pres*, under which the trust might have been preserved, was not in force in the District of Columbia (R. 87). From the portion of the judgment which ordered the destruction of the charitable trust respondents took appeals to the United States Court of Appeals for the District of Columbia, and the decree of the trial court was reversed (R. 102-110). The opinion is reported in 138 F. 2d 581.

With respect to the points raised by the petitioners herein, the following occurred in the Court of Appeals:

1. Petitioners contended in their motion to dismiss all appeals except their own that respondents Olds and American Security and Trust Company, as trustees under the will, and respondents Rollins College and University of North Carolina, as possible successors to Duke University in carrying out the trust, had no standing to appeal as aggrieved parties. Stated otherwise, the questions raised by the motion to dismiss were:

A. Whether trustees of a perpetual charitable trust were aggrieved by and might appeal from a judgment construing a will and holding that the trust had terminated for want of power in the equity court either to substitute a new associate trustee to act with the principal testamentary trustees or to carry out the trust *cy pres;*

B. Whether Rollins College and the University of North Carolina, alleged by the trustees' counterclaim and admitted by petitioners' motion for judgment on the pleadings, to be the southern educational institutions next in line in the mind of the

testator to administer the charitable trust created in the will in lieu of Duke University (R. 27-28), are aggrieved by and might appeal from a determination by the District Court that the doctrine of *cy pres* is not in force in this jurisdiction.

The Court of Appeals denied the motion to dismiss after consideration of very full briefs on the point (R. 110 and Transcript pp. 101-132, 135-160).

2. Petitioners contended the doctrine of judicial *cy pres* was not in force in the District of Columbia. The Court of Appeals decided that it was (R. 106-108).

3. Petitioners contended that the trust established by the will was not charitable in nature. The District Court and the Court of Appeals both decided that it was (R. 87, 90, 105-106).

4. Petitioners contended that no general charitable intent could be found *in* the will, and that no source of information outside the will could be used. The Court of Appeals held that where *the will*, which created a testamentary trust for the erection of an art museum on the campus of Duke University, contained *express language* directing the testamentary Trustees to look to other sources, well known both to the testator and the Trustees, to guide them in carrying out the spirit of his intentions, the *written instrument* indicated that the testator did not intend to make a gift to Duke University as a single beneficiary, but intended that in the event of rejection by that University the trust purposes should be carried out in connection with some other southern university (Court's Opinion, p. 8, R. 109). The Court below also stated that "to divert his estate to his relatives would violate the first expressed and most positively stated intention of his will" (Court's Opinion, p. 9, R. 110) and "that the paramount, dominant and primary purpose of the testator was to give to charity generally" (Court's Opinion, p. 5, R. 106). *Thus, the Court below found from the language of the will itself that the Testator*

manifested a general intention to devote his estate to certain charitable purposes and not to make a specific gift to Duke University.

SHORT ANSWER TO CONTENTIONS OF PETITIONERS.

The Court of Appeals for the District of Columbia decided questions of *local law*, purely of *local interest*, involving the construction of a will of a resident of the District of Columbia and the administration and validity of private charitable trusts. Petitioners' points clearly do not present questions of general importance and are not reviewable by this Court under the provisions of Supreme Court Rule 38 (c) and applicable decisions.

Respondents feel that the foregoing is sufficient to justify denial of the Petition. The summary statement and argument which follow are merely for the purpose of correcting, in fairness to the court below, certain impressions sought to be conveyed in petitioners' brief.

FACTS.

The Will of William Hayes Ackland (R. 6-14) contained the following provisions:

> "ITEM I: I am free from any moral obligation to any of my kindred and at liberty, not only according to law, but according to every principle of natural right, to do whatever I choose with my own property. All of my nearest relatives being already provided with the comforts of life and having no claim whatever upon me, I make no bequest to any of them, except as hereinafter appears. No influence has been brought to bear upon me in the making of this my last will and testament and none of the beneficiaries herein named has any knowledge concerning the manner in which I intend to dispose of my estate.
>
> "I urge upon my executors and trustees, hereinafter named, to carry out as nearly as possible the spirit of

my intentions as expressed herein and as may be expressed to them by other means."

* * * * * * * * *

ITEM VII:

* * * * * * * * *

"(c) I direct my trustees to have erected upon the campus of said Duke University, at Durham, North Carolina, as soon after my death as arrangements therefor can reasonably be completed, a memorial building in the form of a gallery or museum, to include an apse for the interment of my remains, to be known as the 'William Hayes Ackland Memorial', substantially in accordance with plans for such a museum which said Duke University has heretofore submitted to me. I direct that the cost of said building shall be as estimated by the architect who prepared said plans, approximately Two Hundred Fifty Thousand Dollars ($250,000.00), but in no event more than Three Hundred Thousand Dollars ($300,000.00). When said Building shall have been completed, I direct that my remains be transferred to the apse which is to be a part thereof, for permanent interment in a marble sarcophagus beneath a recumbent statue. I further direct that there shall be placed and maintained in said building, on permanent exhibition, all of my tangible personal property and effects preserved for that purpose in accordance with the provisions hereinbefore contained, and such other objects of art as may be added thereto as hereinafter provided.

"(d) The entire balance or remainder of my residuary property and estate aforesaid, including the net proceeds of sale of such of my tangible personal property and effects as may have been sold in accordance with the provisions hereinabove contained, and including also the proceeds of sale of my manuscripts and/or royalties received in respect thereof, shall be held by my trustees with full discretionary powers of management, of sale and resale, in fee simple or otherwise, of investment and reinvestment, of exchange and of changing investments, and, after paying all such costs, charges and expenses as they may deem necessary or proper in the administration of this trust, my trustees

shall allow the net income arising therefrom to accumulate in their hands and shall invest and reinvest the same in accordance with the powers hereinabove set out, but such accumulations and the investments thereof shall be kept in a separate fund, from which there shall be paid such thereof as may be necessary to carry out the following directions, namely:"

(Subparagraphs (d) 1 to 6 provide for certain private or minor bequests not pertinent here)

"7. After the completion of the building provided for in subitem (c) of this ITEM VII of my will, and after the fulfillment of all of the requirements upon the accumulated income from my trust estate the entire remainder of such accumulated income shall be used and applied by my trustees for the perpetual maintenance and upkeep of said building and its contents, and for the acquisition of such objects of art as may be selected and designated by the governing body of Duke University, which objects, when acquired, shall be placed in said building on permanent exhibition, as well as for the enlargement of such building at such time or times as, in the judgment of my trustees, the enlargement thereof shall be feasible.

"8. I hereby give to my trustees full and complete discretion in connection with the administration of my trust estate and in carrying out the directions hereinabove contained, especially those in regard to the construction of the building hereinbefore provided for, and I direct that their decision in regard to any matter arising out of their administration shall be binding and conclusive upon all concerned."

After petitioners, who are next of kin of the testator and who would have received by intestacy property not disposed of by a valid will, had filed a civil action for "construction" of the will, Duke University renounced the benefits, burdens and responsibilities of the trust (R. 16, 29-30). Responsive pleadings then were filed by the trustees under the will and by the other parties defendant, including a niece of decedent who as next of kin would have benefited through destruction of the trust, but who has not joined in

the petition for certiorari. The trustees alleged in their counterclaim that the will, "on its face," indicated "a general charitable purpose of advancing the cause of art and public education" and they asked that the University of North Carolina or Rollins College, non-profit educational and charitable corporations, be appointed to administer the educational and charitable trust provisions of the decedent's will therein directed to be administered by Duke University (R. 26-28). The question from that point forward was whether the doctrine of judicial *cy pres* could be invoked in this case to preserve and carry out the terms of the trust which had become impossible of performance in the exact manner prescribed by the will.

Rollins College, an original party defendant to the suit because named in the will to administer an annual scholarship award (R. 11), filed a claim for consideration as next in line in the testator's wishes (R. 57-60), and the University of North Carolina asserted a similar intervening claim (R. 64, 71-77).

The trial judge, on a motion by petitioners for judgment on the pleadings, decided that the will did create a valid charitable trust (R. 87, 90), but reluctantly, and expressing the wish that his decision would be reversed (R. 80, 83), held that the renunciation of Duke University terminated the trust, because he considered that the doctrine of judicial *cy pres* had been held inapplicable in the District of Columbia (R. 87-88). The trustees under the will, Rollins College, and the University of North Carolina, all of whom are respondents here, took appeals to the Court of Appeals for the District of Columbia.

Petitioners filed a motion for dismissal of these appeals, the nature of which is hereinafter discussed.

The conclusions of the Court below are most clearly stated in the opinion itself (R. 102-110). Briefly, after reviewing the will and some of the circumstances which surrounded the testator at the time of its execution, the Court

held that the doctrine of judicial *cy pres* is in force in the District of Columbia, and that the will of William Hayes Ackland and the impossibility of performing the trust in the exact manner designated provided an appropriate occasion for the exercise of that doctrine.

ARGUMENT.

Petitioners' Motion to Dismiss the Appeals Below Was Entirely Without Merit and Was Properly Denied.

In their brief in support of the petition for certiorari petitioners seek to create the impression that they were deprived of opportunity to challenge the jurisdiction of the Court of Appeals—that the Court ignored their motion to dismiss the three appeals of respondents. A review of what occurred below is therefore necessary out of fairness to the Justices of the Court of Appeals who heard and decided the case and to indicate that petitioners' claim is unfounded.

Petitioners joined as defendants the trustees named in the will, Duke University, the individual legatees under the will, and Rollins College (for reasons already noted). The University of North Carolina filed a motion for leave to intervene. After the renunciation of Duke University, the trustees in protection of the trust, and the other two institutions claiming as next in line to Duke University, asserted in their responsive pleadings that the trust had not failed, but should be carried into effect *cy pres* (R. 17, 27-28, 58-59, 71-75).

The trustees, Rollins College and the University of North Carolina filed separate appeals from the ruling adverse to *cy pres* administration of the trust. The judgment of the District Court directing the termination of the trust ultimately was found by the Court below to be erroneous on the merits. In the meantime, however, petitioners moved to dismiss the appeals on the ground that the respondents had

no standing to appeal, in that they were not parties "aggrieved" within the meaning of the statute establishing the jurisdiction of the Court of Appeals. Their brief in support of the motion (Tr. pp. 101-132) relied on cases in which stakeholders in interpleader proceedings, or executors seeking instructions for the distribution of property in their possession as between ascertainable rival *sui juris* claimants, were held to be without standing to appeal, and they also relied on other cases holding that individual members of the general public had no standing to enforce the proper administration of charitable trusts. To complete the exclusion, they also contended that no public officer had authority to represent the beneficiary interest. In other words, petitioners contended that although the trust might have been erroneously destroyed by the trial court's decree, none of the parties to the suit had standing to appeal from that error and there was no one else who could do so.

In the Court below, petitioners filed a brief and a reply brief, containing a total of forty-six pages, directed solely to the points raised by the motion to dismiss. That Court has a rule,[1] similar to Supreme Court Rule 7, sec. 2,[2] which provides that no oral argument shall be heard on motions without direction of the court. It is the practice to request such argument when desired. Petitioners asked for no such opportunity. When the case was called for final argument, their counsel addressed himself to the merits and simply stated that other points were being submitted on the briefs. After the decision, no petition for rehearing or reconsideration was filed. And in the opinion, the Court below specifically stated that action upon the motion had been postponed until the case could be heard upon its merits and that the

[1] Rule 31 (j) of the Court of Appeals for the District of Columbia: "No Oral Argument Permitted. Such petitions and motions shall be considered and ruled upon in chambers, and no oral argument thereon will be permitted unless directed by the court."

[2] "Oral argument will not be heard on any motion unless the court specially assigns it therefor, when not exceeding one-half hour on each side will be allowed."

motion was denied (R. 110). To say that the court ignored the challenge to its jurisdiction or to suggest that there was any want of opportunity to present the question is contrary to the fact. The conduct of petitioners after the filing of their reply to oppositions to the motion to dismiss is much more consistent with an intention to abandon the point. In the light of these facts it is a serious thing for counsel to suggest that the court below was arbitrary in the disposal of petitioners' contentions and to insinuate that the "integrity of our judicial system" is involved (See Petrs.' brief herein, p. 18). Such charges of judicial misconduct are utterly unfounded.

It is unnecessary to answer the trivial scholasticism that the Court should have discussed its jurisdiction on page one of its opinion instead of disposing of the point at the conclusion. The court below had before it very full briefs on all points presented in the case, including the unmeritorious challenge to its jurisdiction. It is obvious that after the Court fully examined all of the briefs and heard the argument on the merits, it concluded it possessed jurisdiction and proceeded to a decision on the merits and expressly denied the motion to dismiss.

Apparently the substance of petitioner's complaint and the grounds upon which they would have this Court review the case come down to the fact that the Court below did not set out at length its reasons for denying the motion to dismiss.

The Court Below Rejected Petitioners' Contention Upon Which Their Motion to Dismiss Was Based that Duke University Was the Named Beneficiary Under the Will.

In seeking to bring the case within the decisions holding that a mere stakeholder may not appeal, petitioners in their brief below predicated their entire argument upon the assumption that Duke University was a single bene-

ficiary or legatee under the will, so as to make it appear to the Court of Appeals, before the case could be considered upon its merits, that the controversy involved a private dispute between petitioners and Duke University for possession of a legacy renounced by the named legatee and therefore held by the trustees merely as stakeholders. The same contention is urged by petitioners in their brief filed herein (p. 18), where the proposition upon which they place their chief reliance for granting of the writ of certiorari is stated as follows:

> "It is clear that Olds and the Trust Company, as executors and trustees, were not aggrieved by the trial court's decision which merely ordered the payment of the fund renounced by *the named beneficiary* to the next of kin of the testator. As representatives of the estate of the decedent, their powers, duties and privileges must flow from the instrument which they have been designated to administer. Their position should be a neutral one. They are not charged with the duty nor do they have the power to represent the public generally or to advocate their own particular and individual views of public interest." (Italics supplied.)

The record shows that the testamentary trustees have active duties to perform in carrying out the valid charitable trust created by the will. The beneficial interest is not in Duke University but in students of all classes in life who may seek instruction in art and also the general public that may desire to view the objects of art exhibited in the museum (R. 109). The action in the trial court was clearly an adversary proceeding between total strangers to the trust and the trustees with active duties toward parties of an indefinite class who were not before the court and whose interests the trustees were bound to protect. By their motion to dismiss, petitioners simply were seeking to shut off consideration of the case without affording a hearing to any one representing this general class of beneficiaries. The argument seems to answer itself.

In their brief in opposition to the motion to dismiss, the trustees contended that the motion based on such reasoning could not be decided in advance of a hearing on the merits of the questions presented by the appeals, since it involved the construction of the will; that Duke University did not occupy the position of beneficiary, but was a medium through which testator's charitable purposes set forth in the will were to be accomplished, and that it was the duty of the trustees, as parties aggrieved within the meaning of the applicable statute, to appeal from what they considered to be an erroneous decree destroying the trust (see Scott on Trusts, Sec. 178).

Accordingly, the Court below did review the case on the merits and found that the position of Duke University under the will was "more that of a Trustee than the donee of a gift" and that the actual beneficiaries of the charitable trust were intended to be students and other members of the public throughout the South, interested in art, who should visit and use the building. The Court, as if for emphasis, said that Duke University was a trustee with limited powers and not the donee of a gift and that the language of the will would be without meaning if the testator's purpose had been merely to make a gift to Duke University as a single beneficiary (R. 109).

Having so found, it became crystal clear that petitioners' motion to dismiss as to the principal appellants, the Trustees, was based upon an erroneous assumption and was entirely without merit. The contention so persistently advanced by petitioners that a trustee of a perpetual trust for a valid charitable purpose is not a party aggrieved by and may not appeal from a judgment construing the will and holding that the trust thereby created has terminated would seem to border upon the absurd.

There are many, many cases in which trustees and executors have successfully appealed in will construction suits to correct erroneous judgments and to prevent the destruction of their trusts. In *Gearhart* v. *Richardson*, 109 Ohio

St. 418, 142 N. E. 890, a *cy pres* case, the trustee successfully appealed from a decree which terminated a charitable trust. The appellate court said that the judgment was adverse to him in his trust capacity, and as trustee he had as much right and power to appeal as if it had been adverse to him personally. In *Ripley* v. *Brown*, 218 Mass. 33, 105 N. E. 637, it was held that a trustee of a public charitable trust in such circumstances was a person "aggrieved" (the term used in the appeal statute in this case) and entitled to appeal. From a large group of cases, cited to the court below (Tr. pp. 142-150), in which executors and trustees have appealed, the following are selected because the trust was charitable or because the right to appeal was specifically discussed and the type of stakeholder case relied on by petitioners was expressly distinguished.

Re Hubbell's Estate, 121 Cal. App. 38, 8 Pac. 2d 530;
Cheever v. *Washtenaw*, 45 Mich. 6, 7 N.W. 186;
Peoples Bank v. *Trogdon*, 276 Ill. App. 373;
St. James Orphan Asylum v. *Shelby*, 60 Neb. 796, 84 N. W. 273;
Cf. *Webb* v. *Lohnes*, 68 U. S. App. D. C. 310, 96 F. 2d 582.

So far as the University of North Carolina and Rollins College are concerned, many decided cases are clearly to the effect that parties with an interest or right substantially less than that of those two educational institutions in the instant litigation would be aggrieved by a determination such as that made by the trial Court (see Opposition of University of North Carolina to motion to dismiss. R. 96-99.) In this case, these two institutions were directly affected by the erroneous judgment of the District Court, in view of the allegations contained in the trustees' counterclaim, which were admitted by the motion for judgment on the pleadings, that the University of North Carolina and Rollins College were next in line in the mind of the testator, and in view of the trustees' request that one or the other of said institutions be substituted in the place and stead of Duke University.

At the conclusion of its opinion, the Court of Appeals disposed briefly of several minor points which in its judgment did not merit extended discussion. The motion to dismiss was disposed of in similar fashion. Of course the court below did not hold, as petitioners with apparent seriousness now contend, that because it found the decree erroneous it had jurisdiction of the appeal. The discussion of the will and the facts shown by the record in the opinion had already demonstrated the absurdity of the challenge to jurisdiction, and there was no need for further discussion except to point out, as the court did point out, that the matter had received consideration. In view of the fact that the court had proceeded to decide the case on the merits adverse to the contentions advanced by the next of kin in support of their motion to dismiss, the motion obviously had to be denied.

CONCLUSION.

This being a case in which were decided matters of private local law governing the administration of charitable trusts under principles applicable in the District of Columbia, and the only other point being a complaint that the Court, without extended discussion, disposed of an unsubstantial and unmeritorious challenge to its jurisdiction, it is respectfully submitted that there is an entire absence of anything of general importance within the scope of review by this court under its long-standing practice in regard to

District of Columbia matters, and that the Petition for Writ of Certiorari filed herein therefore should be denied.

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